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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM O. ROYSTER,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

SHERYL GORDON MCCLOUD
LAW OFFICES OF SHERYL GORDON MCCLOUD
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 224-8777

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51pp

QUESTIONS PRESENTED

The trial judge left the bench during a portion of the government's closing argument but remained on the bench during every presentation made by the defense, thus indicating trust for the government but not the defense.

1. Does the Fourth Circuit's holding that the trial judge's absence was harmless error conflict directly with decisions of the Ninth Circuit (*Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995)), the Third Circuit (*United States v. Mortimer*, 161 F.3d 240 (3rd Cir. 1998)), and several state courts (*e.g.*, *People v. Vargas*, 174 Ill.2d 355, 673 N.E.2d 1037 (1996); *People v. Toliver*, 89 N.Y.2d 843, 844-45, 675 N.E.2d 463, 464 (1996)), which hold that a judge's absence from the trial constitutes reversible, structural error?

2. Does the Fourth Circuit's decision that the trial judge's absence from the bench during a portion of the government's closing, but none of the defense presentations, was harmless error, conflict in principle with *Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Tumey v. Ohio*, 273 U.S. 510 (1927), which hold that absence of neutral judicial supervision constitutes reversible error without any showing of prejudice?

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I. PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner William O. Royster respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

II. OPINIONS BELOW

Mr. Royster's conviction was affirmed on direct appeal in *United States v. Royster*, No. 94-5625 (4th Cir. July 31, 1995) (App., *infra*, 1a-8a).

Mr. Royster timely filed a 28 U.S.C. § 2255 motion challenging his conviction and sentence. It was denied on January 27, 1998 (App., *infra*, 9a-28a). The Fourth Circuit affirmed the denial of the § 2255 motion on September 30, 1998. That decision appears at App., *infra*, 29a-30a. The decision of that court denying Mr. Royster's petition for rehearing and suggestion for rehearing en banc was entered on December 28, 1998. It appears at App., *infra*, 31a.

III. JURISDICTION

The Fourth Circuit's decision denying rehearing and rehearing en banc was filed on December 28, 1998. This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

V. STATEMENT OF THE CASE

A. Procedural Background

Mr. Royster was charged with conspiracy to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (Count 1); extortion, in violation of 18 U.S.C. § 1951 (Count 2); tampering with a witness, in violation of 18 U.S.C. § 1512 (Count 3); making false declarations to the grand jury, in violation of 18 U.S.C. § 1623 (Counts 4 and 5); and forfeiture pursuant to 21 U.S.C. § 853 (Count 6). Clerk's Record ("CR") 3. He was convicted as charged after a jury trial and the district court ordered forfeiture pursuant to Count 6. Judgment was entered on August 11, 1994.

The district court had original jurisdiction over the underlying criminal case pursuant to 18 U.S.C. § 3231. The Fourth Circuit affirmed on direct appeal. *United States v. Royster*, No. 94-5625 (4th Cir. July 31, 1995) (App. 1a-8a).

The district court had jurisdiction over the subsequent 28 U.S.C. § 2255 motion pursuant to 28 U.S.C. § 2241. In that motion, Mr. Royster alleged: (1) that counsel was ineffective; (2) that the trial judge's absence from the bench during the prosecutor's closing argument violated his right to due process; and (3) that instructional errors necessitated vacating Counts 2, 4, and 5.

B. Factual Background

Mr. Royster was the Chief of Detectives for the Police Department in Oxford, North Carolina, at the time of his indictment. He had worked as a police officer in Oxford since 1971 and had been promoted to the position of Chief of Detectives in August 1989.

The government charged him with using his position to protect Oxford's main drug distribution network. Its case was based primarily on the testimony of convicted members of a cocaine distribution organization that operated in Oxford; the kingpin was an Oxford resident named Patrick Sidney. Several people who worked for Sidney in that drug conspiracy testified – in exchange for government promises of leniency at sentencing – that from 1987 or 1988 until about 1990, Royster accepted money from Sidney and in exchange provided protection

from arrest and confidential police information. Mr. Royster testified in his own defense and denied committing all charged crimes.

The jury convicted on all counts. The district court found that the amount of drugs involved was not in excess of 50 kilograms. With several adjustments, Mr. Royster's sentencing range was 235 to 293 months. He was sentenced to 293 months for conspiracy, 240 months for extortion, 120 months for witness tampering, and 60 months for the false statement counts, to run concurrently.[1]

C. The Undisputed Facts Concerning this Claim

Immediately before the prosecutor began his closing argument, the district court told the jury:

> *Finally, let me say to you that during the course of the arguments I may not stay here at the bench. I may go back into chambers and work on other matters,* my charge or other matters that I have to attend to. But if I leave the bench, I'll be in ear shot of what's going on. If one of the lawyers should object to something that the other said, why, they know to stop their arguments until I can come back into the courtroom and rule on whatever the objections might be.

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[1] The Court also imposed supervised release of five years on Count 1 and a concurrent three-year term of supervised release on Counts 2-5, and a fine of $19,000. *Id.*

> As you know, the lawyers are officers of the court, and they follow the rules of the court in every respect.

TR (transcript) at 1981 (emphasis added).

The judge then left the bench during the government's initial closing argument. TR at 1981-82.

The record proves this. At the conclusion of the government's argument, the judge was clearly absent – it was the *clerk* who told the jury: "Members of the jury, we're going to take a recess before Mr. Currin speaks with you. If you'll just wait a minute, Judge Fox will be back." TR at 1982.

D. The District Court's Decision

The district judge rejected the § 2255 claim that his absence during government closing constituted reversible error. He explained that he was not absent from *all* of the government's argument and that even if he were, there is no controlling rule that this constitutes reversible error. Opinion, p. 9 (App. 18a, *infra*).

The district court opinion implied that this claim is factually unsupported because the transcript fails to show that the judge was absent from the government's *entire* closing. Opinion, p. 3 (App. 11a, *infra*). The opinion goes on to acknowledge, however, that the judge was absent from the courtroom during a good portion of the government's initial closing argument, as he promised he would be:

> it long has been the practice of the undersigned to step in and out of the courtroom during closing arguments – irrespective of which party may be at "bat" – to conduct other court business. . . . Therefore, it is certainly likely that, at *some point* during the first portion of the Government's closing argument, the undersigned was absent from the courtroom; the Clerk's comment on the record is sufficient indication that the judge was absent at the moment the comment was made.

Opinion, p. 4 (App. 12a-13a, *infra*) (emphasis in original).

The district court opinion also acknowledges that the transcript *correctly* states that the judge advised the jury that he might absent himself from the courtroom during the closing argument. Opinion, p. 3 (App. 12a, *infra*) (quoting TR 1981). Further, the opinion acknowledges that the transcript *correctly* shows that the judge was absent during at least a portion of the prosecutor's closing argument. Opinion, p. 3 (App. 12a, *infra*) (quoting TR 1982).

Finally, the opinion states that in considering Mr. Royster's § 2255 motion, the court received and relied upon the correctness of defense trial counsel's affidavit – submitted by the *government* in *opposition* to the § 2255 motion – which states, in part:

> *The judge left the bench during a portion of the prosecutor's opening. To the best of the undersigned's recollection, Judge Fox returned to the courtroom at the end of the government's opening,* instructed the jury with regard to a recess, and after recess returned to the bench during the

> closing statements of the undersigned [defense counsel]. . . .

Affidavit of Defense Counsel Currin, submitted by government, as quoted in Opinion at p. 5 (App. 13a-14a, *infra*) (emphasis added).

No other evidence modified or contradicted this. The record is therefore clear: the trial judge left the bench during the government's initial closing argument, and returned only after the government's initial closing was complete. He remained on the bench thereafter, including during defense counsel's entire closing argument (and the government's rebuttal closing). The trial court rejected Mr. Royster's claim only because such an error does not warrant reversal. Opinion, p. 8 (App. 17a-18a, *infra*). It rejected Mr. Royster's claims of ineffective assistance of trial and appellate counsel for failure to object to, or raise on appeal, trial counsel's absence, for the same reason. Opinion, p. 9 (App. 18a-19a, *infra*).

E. The Fourth Circuit's Decision

The Fourth Circuit affirmed, addressing only the single issue of whether the judge's absence from the bench required reversal. It acknowledged that the trial court judge was absent "during the Government's closing argument." App. 30a. It concluded, however, that the absence was not prejudicial.

VI. REASONS FOR GRANTING THE WRIT

A. All Courts Agree that Trying a Case Without a Judge Constitutes Fundamental Error

The judge's presence throughout the trial is required to make the trial a trial. Black's Law Dictionary (5th ed. 1983) (defining trial as "[a] *judicial* examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has proper jurisdiction") (emphasis added).

Thus the courts that have considered the propriety of a judge's decision to leave the bench during a trial, without suspending the trial, are *uniform* in holding that this practice is error. For example, in *Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995), the appellate court *granted* a petition for writ of habeas corpus due to the trial judge's absence from the bench during a readback of testimony to the jury, explaining: "The presence of a judge is at the very core of the constitutional guarantee of trial by an impartial jury. . . . This proposition has been so generously admitted, and so seldom contested, that there has been little occasion for its distinct assertion." *Id.* (judge's absence from bench combined with the judge's failure to exercise discretion over whether certain testimony should be read back to jury constituted reversible error, even on petition for writ of habeas corpus).

Similarly, in *United States v. Mortimer*, 161 F.3d 240 (3rd Cir. 1998), the court reviewed a trial in which the district court judge disappeared from the bench during a portion of defense counsel's summation. That judge returned for the end of closing. There, as here, the judge

gave no indication that exigency caused the absence. The Third Circuit ruled that the trial judge's absence during a portion of closing was reversible, constitutional, structural, error.

Likewise, in *People v. Vargas*, 174 Ill.2d 355, 673 N.E.2d 1037 (1996), the Illinois Supreme Court explained that the trial judge's absence from cross-examination of a witness during a felony trial constitutes reversible error. "In this regard, a trial judge's active presence on the bench helps to ensure that the defendant will have a fair trial. This court has observed that without the trial judge's presence in the courtroom, there is no judicial authority in the minds of the jury." *Id.*, 174 Ill.2d at 364, 673 N.E.2d at 1041-42 (citation omitted).

The court in *Heflin v. United States*, 125 F.2d 700 (5th Cir.), *cert. denied*, 316 U.S. 687 (1942), came to the same conclusion; it ruled that it was error for the trial judge to leave the bench during defense counsel's closing argument, even though it was only to use the bathroom. The Fifth Circuit explained: "In a trial by jury the judge is an essential actor, and he should be present during all the proceedings. If he has to leave the bench, the trial should be suspended." *Id.* (error, although not reversible, in part because it occurred during defense counsel's closing and defense counsel had choice of continuing or not).

In fact, we have found no court that approves of holding a jury trial while the judge is absent. Reviewing

courts for over 100 years have held that this practice constitutes error.[2]

B. The Courts are in Conflict Over Whether the Trial Judge's Absence from the Bench Constitutes Structural Error

Of critical importance to this petition is the fact that two other circuits and several state courts hold that the

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[2] *See generally,* Annot., *Absence of Judge from Courtroom During Criminal Trial Prior to Time of Reception of Verdict,* 34 A.L.R. 2d 683 (1997) (listing scores of authorities from past century holding that judge's absence from trial is error). *See People v. Lumpkin,* 173 A.D.2d 738, 740-41, 570 N.Y.S.2d 620, 622 (2d Dep't 1991) (judge's absence from courtroom "does not comport with the Judge's supervisory role . . . or with the established expectations and conventions that underlie the judicial function"); *People v. Chrfrikas,* 295 Ill. 222, 228, 129 N.E. 73, 75 (1920) ("The trial judge should not be even temporarily absent from the court room while the trial of a case proceeds, – and particularly in a criminal case, – even though he is within hearing.") (reversed, in part because of judge's absence from bench during prosecutor's closing argument in which prosecutor used inflammatory and objectionable argument, even though trial judge returned to courtroom and struck objectionable arguments); *State v. Martinez,* 25 N.M. 328, 18 P. 868 (1919) (also noting that judge's absence constitutes due process violation); *Slaughter v. United States,* 5 Ind. T. 234, 82 S.W. 732 (1904); *Starr v. United States,* 4 Ind. Terr. 550, 76 S.W. 105 (1903); *Graves v. People,* 32 Colo. 127, 133, 75 P. 412, 414 (1904) (presiding judge left bench and went into adjoining room during prosecutor's opening and closing in this criminal trial, and remained there more than five minutes each time; reviewing authorities and holding "the defendant had the right to the presence of the presiding judge during the argument of the case before the jury"; reversing conviction); *Turbeville v. State,* 56 Miss. 793 (1879).

trial judge's absence from the bench is not just error, but reversible, structural, error. In *Riley v. Deeds*, 56 F.3d 1117, 1119-21, the Ninth Circuit ruled that a judge's absence from the bench during a read-back of testimony, coupled with the judge's failure to exercise discretion over whether certain testimony should be read back to the jury, constituted "structural constitutional error" requiring reversal. Notably, that case was decided on review of a collateral attack, the same procedural posture as Mr. Royster's case. Still, the Ninth Circuit ordered that the writ be granted: "A conviction obtained after a proceeding in which no judge presided and no judicial discretion was exercised is 'abhorrent to democratic conceptions of justice.' " *Id.*, 56 F.3d at 1120 (citation omitted).

The Fourth Circuit's decision also stands in direct conflict with the Third Circuit's quite recent decision on this point. In *United States v. Mortimer*, 161 F.3d 240, the Third Circuit held that the trial judge's absence from the exact same portion of the proceeding – closing argument – necessitated reversal. Contrary to the Fourth Circuit, the *Mortimer* court ruled that such absence constitutes "structural" error, and that consent cannot be inferred from counsel's silence on the point.

Many recent state high court cases deciding this issue have also held that the trial judge's absence from a criminal trial is reversible error *per se*. In *People v. Vargas*, 174 Ill.2d at 366, 673 N.E.2d at 1043, the Illinois Supreme Court held that total judicial absence from a portion of a felony trial is *per se* reversible error "because such error is inherently prejudicial, not only to the defendant's right to

a fair trial but also to the integrity of the judicial process."[3] Similarly, in *People v. Toliver*, 89 N.Y.2d 843, 844-45, 675 N.E.2d 463, 464 (1996), New York's highest state court explained that the trial judge's absence from part of a criminal trial (prosecutor's voir dire) was *per se* reversible error depriving the defendant of a "fundamental right." *Accord People v. Cook*, 659 N.Y.S.2d 510 (1997) (reversing criminal conviction without discussion after declaring trial judge's absence from courtroom without consent while testimony was read back to jury was improper); *People v. Ahmed*, 487 N.E.2d 894 (N.Y. 1995) (improper delegation of judicial function to authorize law clerk to answer jurors' questions); *Glee v. State*, 639 So.2d 1092, 1093 (Fla. 1994); *Brown v. State*, 538 So.2d 833, 836 (Fla. 1989). In fact, state reviewing courts over the last century have ruled that the judge's absence necessitates reversal, even where as here the judge's absence occurs *during the prosecution closing*. *Slaughter v. United States*, 5 Ind. T. 234, 82 S.W. 732; *Graves v. People*, 32 Colo. 127, 75 P. 412; *Turbeville v. State*, 56 Miss. 793.

In contrast, several state high courts apply harmless error review. *E.g.*, *State v. James*, 110 Ariz. 334, 519 P.2d 33, 36 (Ariz. 1974); *People v. Garcia*, 826 P.2d 1259, 1266 (Colo. 1992); *McBrady v. State*, 459 N.E.2d 719, 722 (Ind. 1984); *Sand v. State*, 467 So.2d 907, 908-10 (Miss. 1985).

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[3] Indeed, that Court noted that even when the trial judge is "constructively present" – *i.e.*, off the bench but able to listen to and participate in the proceedings from a nearby anteroom – the jury's attitude toward the case might still be adversely affected. *Id.*, 174 Ill.2d at 369, 673 N.E.2d at 1044.

C. The Fourth Circuit's Decision Conflicts in Principle With this Court's Decisions Holding that Absence of Neutral Judicial Supervision Constitutes Structural Error

The Fourth Circuit's decision also conflicts in principle with another line of cases. This Court has held that a structural defect in the trial mechanism constitutes reversible error *per se* and defies review for harmlessness. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The absence of neutral judicial supervision is *precisely* the sort of error that defies review for harmlessness under this analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927), the seminal decision on the absence of a neutral judge presiding over the trial, as example of error in trial structure that remains reversible *per se*).

The Fourth Circuit's decision conflicts with these cases because not only was judicial supervision lacking – neutrality was lacking, also. The judge never left the courtroom while the defense was speaking; he left the courtroom only while the government closed. The judge's actions indicated, to lay jurors, even if unintentionally, that he trusted the government enough to refrain from doing anything wrong during his absence – but he did not trust the defense that much. At the conclusion of the government's closing, the Clerk – apparently through pre-arrangement – told the jury: "Members of the jury, we're going to take a recess before Mr. Currin [defense counsel] speaks with you. If you'll just wait a minute, Judge Fox will be back." TR at 1982. The judge then returned to the courtroom for defense counsel's entire argument.

This conduct carries a stamp of approval akin to vouching, and, coming from the judge, it shows lack of judicial neutrality.[4] Thus, the Fourth Circuit's decision in this case conflicts in principle with controlling precedent of this Court holding that lack of neutral judicial supervision constitutes structural error.[5]

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[4] *See United States v. Lewis*, 10 F.3d 1086, 1088 (4th Cir. 1993) (impermissible prosecutorial vouching occurs when government takes "actions [that] are such that a jury could reasonably believe that the prosecutor was indicating a personal belief in the credibility of the witness."); *United States v. Samad*, 754 F.2d 1091, 1100 (4th Cir. 1984); *United States v. Piva*, 870 F.2d 753, 760 (1st Cir. 1989).

[5] A trial judge's absence is characterized as error under *all* the authorities of which we are aware (as cited above). Even the decisions cited by the government in the courts below state that it is improper for the judge to be absent from the courtroom during any stage of a trial – they simply rule the error harmless under certain circumstances, which is quite a different matter. *See United States v. Grant*, 52 F.3d 448, 449 (2d Cir. 1995) (appellate court does "not encourage trial judges to absent themselves from the bench"); *United States v. Pfingst*, 477 F.2d 177, 196-97 (2d Cir. 1973) (same); *Stirone v. United States*, 341 F.2d 253, 257 (3d Cir.) (Chief Judge noted that he was "disturbed by the fact that the trial judge left the bench during the course of peremptory challenges") (Biggs, J., concurring), *cert. denied*, 381 U.S. 902 (1965).

A debate about what standard of review should apply to the judge's absence, however, is irrelevant to the question of whether it constitutes error in the first place. Thus, there was no justification for counsel's failure to object to the judge's absence at trial or appellate counsel's failure to raise this issue, which was clear from the record, on appeal. Such ineffective assistance satisfies the "cause and prejudice" prerequisite to obtaining relief in a § 2255 motion. *United States v. Frady*, 456 U.S. 125, 167-68 (1982); *Carpenter v. Mohr*, 163 F.3d 938, 947 (6th Cir. 1999)

VII. CONCLUSION

"A conviction obtained after a proceeding in which no judge presided and no judicial discretion was exercised is 'abhorrent to democratic conceptions of justice.' " *Riley v. Deeds*, 56 F.3d 1117, 1120 (citation omitted). This Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the conflict between its decision affirming such a conviction, and the decisions holding such absence to be structural error.

Respectfully submitted,

LAW OFFICES OF SHERYL
GORDON MCCLOUD
SHERYL GORDON MCCLOUD
Counsel of Record
1201 Third Avenue, Suite 3200
Seattle, WA 98101

(same standard applied to § 2254 claim); *United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996), *cert. denied*, 520 U.S. 1269 (1997) ("Establishing the elements of an ineffective assistance claim normally will meet [the] cause and prejudice test"); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) (ineffective assistance constitutes cause and prejudice); *United States v. Gaudet*, 81 F.3d 585 (5th Cir. 1996) (same); *Romero v. Tansy*, 46 F.3d 1024, 1030 (10th Cir.), *cert. denied*, 515 U.S. 1148 (1995) (same).

APPENDIX I

UNITED STATES of America, Plaintiff-Appellee,

v.

William Oscar **ROYSTER**, a/k/a W. O.,
Defendant-Appellant.

No. 94-5625.

United States Court of Appeals,
Fourth Circuit.

Argued May 4, 1995.

Decided July 31, 1995.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Chief District Judge. (CR-94-26).

E.D.N.C.

AFFIRMED.

ARGUED: William H. Murphy, Jr., Baltimore, MD, for appellant. John Eric Evenson, II, Asst. U.S. Atty., Raleigh, NC, for appellee. ON BRIEF: Janice McKenzie Cole, U.S. Atty., Raleigh, NC, for appellee.

Before RUSSELL, HAMILTON, and LUTTIG, Circuit Judges.

OPINION

PER CURIAM:

Defendant-Appellant William O. Royster appeals his convictions for drug related offenses. Royster argues that his convictions should be reversed because the district

court committed reversible error in admitting certain evidence at trial and in permitting more than one government agent to remain in the courtroom during trial. Finding no reversible error, we affirm.

I.

On February 17, 1994, a grand jury in the Eastern District of North Carolina issued a six-count indictment against Royster, the Chief of Detectives of the Oxford Police Department in Oxford, North Carolina. The indictment charged Royster with: (1) conspiracy to possess with intent to distribute and distribution of cocaine in violation of 21 U.S.C. § 846 (Count 1); (2) extortion in violation of 18 U.S.C. § 1951 (Count 2); (3) tampering with a witness in violation of 18 U.S.C. § 1512(b)(3) (Count 3); (4) two counts of making a false declaration to a grand jury in violation of 18 U.S.C. § 1623 (Counts 4 and 5); and (5) forfeiture of money and property obtained from the felonious activities pursuant to 21 U.S.C. § 853 (Count 6).

At Royster's 11-day jury trial beginning on April 25, 1994, the government presented evidence that Royster had accepted payoffs from Patrick Sidney, the leader of a cocaine distribution organization in Oxford, in order to provide the organization with local police protection and information. Sidney testified at trial that, between March or April of 1987 and continuing through 1990, he paid Royster approximately $100,000 to $125,000 in exchange for the protection and information.

On May 9, 1994, the jury convicted Royster on all counts, including a separate verdict ordering forfeiture of $55,000 in drug proceeds.

On August 8, 1994, the district court sentenced Royster to 293 months on Count 1, 240 months on Count 2, 120 months on Count 3, and 60 months each on Counts 4 and 5, with the sentences on Counts 2 through 5 to run concurrently with the sentence on Count 1. The court also fined Royster $19,000.

II.

Royster first contends that the district court committed reversible error by permitting Agent Steele Myers of the North Carolina State Bureau of Investigation to testify on redirect examination about the entire contents of his written report of an interview with coconspirator Jimmy Chavis. Defense counsel objected to the admission of the testimony, and the court overruled the objection, reasoning that defense counsel had opened the door to introduction of the content of the report during his cross-examination of Myers. We review for abuse of discretion the district court's evidentiary decision to admit evidence. *United States v. Lewis*, 10 F.3d 1086, 1088 (4th Cir.1993).

Royster complains that the admission of the report was "devastating" because it detailed Royster's payoff arrangement and erroneously permitted the government to bolster Chavis' credibility by showing that his statement to Agent Myers was consistent with his testimony at trial. He argues that he did not open the door to the entire interview but limited his questioning to the portion of the conversation between Myers and Chavis that was not contained in the interview report. The government

responds that, by implying that Sidney and another co-conspirator had improperly influenced Chavis to fabricate a statement against Royster, and by eliciting and offering hearsay and double hearsay information from Myers' interview report on cross-examination, Royster opened the door to allow the government to introduce Myers' entire report to bolster Chavis's credibility under Fed.R.Evid. 806.[1] The government further contends that admission of the report was justified because Royster raised the issue of the substance and accuracy of the interview report by expressly referring to the report in his cross-examination of Myers.

We need not decide whether the district court abused its discretion in allowing Myers to testify about the entire interview report because we hold that any purported error was harmless. "[I]n the realm of nonconstitutional error, the appropriate test of harmlessness . . . is whether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."[2] *United States v. Williams,* 41 F.3d

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[1] Fed.R.Evid. 806 states in pertinent part:

When a hearsay statement . . . has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

[2] Although Royster offers no legal basis to support his argument that the admission of the report violated his Fifth Amendment right to due process, we hold that, even if any error were of constitutional significance, Royster would not be entitled to have his convictions reversed because any error was harmless beyond a reasonable doubt in light of the

192, 199-200 (4th Cir.1994) (*quoting United States v. Sanders*, 964 F.2d 295, 299 (4th Cir.1992)), *cert. denied*, 115 S.Ct. 1442 (1995); *see* 28 U.S.C. § 2111 (judgments are not to be set aside on appeal based on "errors or defects which do not affect the substantial right [sic] of the parties"); Fed.R.Crim.P. 52(a) (same). The outcome of this harmless error analysis depends on the particular facts of the case. *United States v. Grooms*, 2 F.3d 85, 89 (4th Cir.1993), *cert. denied*, 114 S.Ct. 1550 (1994).

In determining that any error was harmless, we first recognize that Chavis testified at trial and that Royster's opportunity to cross-examine Chavis about his statement to Myers effectively cured any harm or prejudice that may have resulted from admitting the report. *Cf. Idaho v. Wright*, 497 U.S. 805, 823 (1990) (although corroborating evidence does not determine that a hearsay statement is reliable, "the presence of corroborating evidence . . . indicates that any error in admitting the statement might be harmless"). In the face of this scant evidence of harm, the evidence at trial overwhelmingly demonstrated Royster's guilt. *Cf. Williams*, 41 F.3d at 200 (holding that error in the admission of hearsay statement was harmless in

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overwhelming evidence of guilt. *See Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991) (compiling cases holding that trial errors of constitutional significance do not require reversal if they are harmless beyond a reasonable doubt). We add that the admission of the report clearly did not violate the Confrontation Clause of the Sixth Amendment because the hearsay declarant, here Chavis, was subjected to cross-examination at trial. *See California v. Green*, 399 U.S. 149, 164 (1969) (holding that the admission of hearsay testimony does not violate the Confrontation Clause when declarant is testifying as a witness and subject to cross-examination at trial).

part due to "the overwhelming evidence of guilt"); *United States v. Velazquez*, 847 F.2d 140, 143 (4th Cir.1988) (holding that any error in admitting evidence was harmless "in view of other overwhelming evidence of guilt"). The government's case consisted of 39 witnesses and approximately 300 exhibits. Several coconspirators, including Sidney himself, as well as law enforcement agents and civilian witnesses, offered testimonial evidence linking Royster to the Sidney drug conspiracy. In addition, the government introduced a damaging audiotape of a conversation between Royster and Chavis, in which Royster told Chavis that Chavis should lie to the grand jury about the Sidney organization. The government also presented at trial the transcript of Royster's testimony before the grand jury, in which Royster made false statements regarding his contact with Chavis and members of the Sidney organization. In contrast to the government's evidence, Royster's case consisted of his own testimony, in which he denied the allegations, and the testimony of four law enforcement agents and one other government official, all of whom commended Royster's antidrug police work in Oxford.

Considering the opportunity to cross-examine Chavis and the sum of evidence at trial, we conclude that the jury's verdict was not swayed by the admission of Myers' testimony on the full content of the interview report and that any error in admitting the testimony was therefore harmless.

III.

Royster next contends that the district court committed reversible error by allowing, over his objection, more than one government agent to remain in the courtroom during trial. Specifically, he argues that the court's allowing three agents to remain in the courtroom violated Fed.R.Evid. 615. Rule 615 provides:

> Exclusion of Witnesses
>
> > At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of [sic] party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Fed.R.Evid. 615. Due to the mandatory language of Rule 615, we review de novo the district court's decision not to sequester a witness at the request of a party. *See United States v. Farnham*, 791 F.2d 331, 334-35 (4th Cir.1986).

Royster's argument clearly lacks merit because only one of the three government agents, Agent Myers, testified at trial. In *Farnham*, this Court recognized that under Rule 615(2) a district court may allow the government's chief investigating agent to remain in the courtroom throughout the proceedings, even if he is expected to testify. *Id.* at 334. In this case, Agent Myers clearly comes within Rule 615(2), and Royster conceded as much at oral

argument. Regarding the presence of the two other agents in the courtroom, Royster cannot object to their presence under Rule 615. The Rule only applies to "witnesses" and these agents were not witnesses at trial.[3]

IV.

For the foregoing reasons, we affirm Royster's convictions.

AFFIRMED

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[3] Royster asserted at oral argument that, even though the other agents were not witnesses, allowing them to remain in the courtroom infringed his right to call the agents as witnesses at trial. Royster, however, could have protected this right simply by placing these agents on his witness list, something he did not do.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-287-F
No. 5:94-CR-26-1-F

UNITED STATES OF AMERICA,	)	
v.	)	ORDER
WILLIAM O. ROYSTER, a/k/a "W.O."	)	(Filed Jan. 27, 1998)
Defendant.	)	

This matter is before the court on motion of the Government to dismiss this § 2255 action or, in the alternative, for summary judgment. Defendant ("Royster") has responded in opposition thereto, and the matter is ripe for disposition.

Following a jury trial, Royster was convicted of conspiracy to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (Count 1); extortion, in violation of 18 U.S.C. § 1951 (Count 2); tampering with a witness, in violation of 18 U.S.C. § 1512 (Count 3); making a false declaration to a federal grand jury, in violation of 18 U.S.C. § 1623 (Counts 4 & 5); and was ordered to forfeit money and property obtained from felonious activities pursuant to 21 U.S.C. § 853 (Count 6). The court conducted a sentencing hearing on August 8, 1994, after which the undersigned sentenced Royster to a term of 293 months on Count 1, and concurrent sentences

on Counts 2-5 of 240 months, 120 months, 60 months, and 60 months, respectively. The conviction and sentence were affirmed on direct appeal. *See United States v. Royster*, No. 94-5625 (4th Cir. July 31, 1995) (UP).

By the instant motion, Royster advances four constitutional claims:

1. Ineffective assistance of counsel in violation of his Sixth Amendment rights
   a. Trial counsel failed to present available character evidence;
   b. Trial counsel failed to object to trial judge's absence from courtroom; and
   c. Appellate counsel failed to assign as error trial judge's absence from courtroom
2. Fifth Amendment due process and fair trial violation by virtue of trial judge's absence from courtroom
3. Fifth and Sixth Amendment violations by virtue of court's instruction to jury that a police officer is a public official
4. Fifth and Sixth Amendment violations by virtue of court's instruction to jury that questions asked of the defendant before a federal grand jury constituted "material" matters for purposes of 18 U.S.C. § 1623.

These claims more easily may be addressed by grouping them into three substantive categories: (a) trial judge's absence from courtroom; (b) jury instructions; and (c) character evidence. The court will address these matters seriatim.

A. TRIAL JUDGE'S ABSENCE FROM COURTROOM

Royster advances three claims which turn on his contention that the undersigned "left the bench while the prosecutor gave his closing argument. RT. at 1981-82." Royster's Memorandum in Support of § 2255 Motion at 3 (hereinafter "Memo"). Royster asserts that the undersigned indicated to the jury by absenting himself from the courtroom that the prosecutor could be trusted in his absence but, by returning to the bench to "watch over" defense counsel's closing argument, indicated that the latter could not be so trusted. In effect, Royster argues, the court "vouched" for the integrity of the Government lawyer and for the veracity of his argument.

Royster is correct that before the parties began closing arguments, the undersigned advised the jury as follows:

> Finally, let me say to you that during the course of the arguments I may not stay here at the bench. I may go back into chambers and work on other matters, my charge or other matters that I have to attend to. But if I leave the bench, I'll be in ear shot of what's going on. If one of the lawyers should object to something that the other said, why, they know to stop their arguments until I can come back into the courtroom and rule on whatever the objections might be.
>
> As you know, the lawyers are officers of the court, and they follow the rules of the court in every respect.

RT at 1981. Contrary to Royster's suggestion, the record does *not* indicate that the "judge then left the bench while

the prosecutor gave his closing argument. RT at 1981." Memo at 3. Rather, immediately following the comments quoted above, the trial transcript continues, in pertinent part, as follows:

> [THE COURT] Listen carefully now, if you will, as Mr. Evenson comes before you to make his concluding argument.
>
> MR. EVENSON.
>
> (THE CONCLUDING ARGUMENTS OF MR. EVENSON WERE NOT TRANSCRIBED.)
>
> MADAM CLERK: Members of the jury, we're going to take a recess before Mr. Currin (defense counsel) speaks with you. If you'll wait just a minute, Judge Fox will be back.
>
> THE COURT: We'll take a break, members of the jury, for our morning recess. We'll start back at 10:25. Step to the jury room at this time. Don't discuss the case yet because you've got to hear all the arguments and the court's instructions as to the law.

RT at 1982.

Based upon the Courtroom Deputy Clerk's comment to the jury, it is reasonable to conclude that the trial judge was not *at that point* in the courtroom. Furthermore, it long has been the practice of the undersigned to step in and out of the courtroom during closing arguments – irrespective of which party may be "at bat" – to conduct other court business, including finalizing jury instructions. Therefore, it certainly is likely that, at *some point* during the first portion of the Government's closing argument, the undersigned was absent from the courtroom; the Clerk's comment on the record is sufficient indication

that the judge was absent at the moment the comment was made. However, a fundamental problem with Royster's argument on the question of the trial judge's absence from the courtroom is the absence of a meaningful record thereof.

The court perceives the problem as more than technical. Without a record of the extent of judge's absence from the courtroom during the closing argument portion of a trial, a "reviewing" court – even the court in question – necessarily is required to engage in mere speculation as to what, if any, prejudice such absence might have inflicted on a party. The only competent evidence of record, other than the Deputy's Clerk's comment, quoted above, with regard to the judge's presence or absence from the courtroom during closing arguments is contained in the affidavit of Royster's lead trial counsel, Thomas L. Currin.[1] In pertinent part, Currin recollects:

> The Undersigned became aware immediately prior to the beginning of the prosecutor's opening of closing statements that the judge might not remain on the bench during all of the arguments. The judge informed the jury that if he was not on the bench, he would nevertheless be listening to the arguments in his chambers immediately adjacent to the courtroom. The judge indicated to the jury that the lawyers were officers of the court. The judge left the bench during a portion of the prosecutor's opening. To the best of the undersigned's recollection, Judge Fox returned to the courtroom at the end of the

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[1] Royster's other two trial lawyers have filed affidavits concurring in Currin's recollection of the relevant events.

> government's opening, instructed the jury with regard to a recess, and after recess returned to the bench during the closing statements of the undersigned and Mr. Finch and also Mr. Evenson's closing. Mr. Evenson had elected to open and close the final statements to the jury. The undersigned was not aware of any rule or case requiring a judge in the Eastern District of North Carolina to remain on the bench at all times during the course of the closing arguments. Judge Fox was not absent for the closing of the government's final statement to the jury and in the opinion of the undersigned Judge Fox's conduct in this regard was not unique and was not objectionable. . . .

Currin Affidavit, Exhibit B to Government's Memorandum in Support of Motion, at ¶ 4. Royster has not proffered any evidence contrary to his trial counsel's testimony in this regard, and the court is unaware of any. Consequently, for purposes of the instant motion, the court will assume the correctness of Currin's recollection as quoted above, as it is consistent with the official record to the extent that the record reflects the judge's presence in or absence from the courtroom.

Royster's first contention is that the trial judge's absence from the courtroom during the Government's closing argument, in light of his returning to "watch over" the defense argument, amounts to "vouching" for the credibility, integrity or validity of the Government's case. Even assuming the trial judge was absent for a portion of the Government's closing argument, the conclusion Royster draws as to the effect on the jury's perception thereof is purely speculative and unsupported by any evidence of record. Royster further claims that "the

trial judge's absence from the bench was both lengthy and lopsided. . . . [H]e was absent only when the government attorney was closing. . . . " Memo at 6. However, as noted above, the evidence of record is that the undersigned returned to the courtroom to sit through, not only defense counsel's closing, but also through the prosecutor's rebuttal. Royster's attack on the "judge's selective absence from the bench" simply fails on the facts.

The Government argues, first, that Royster waived any objection he might have had to the judge's leaving the courtroom by not raising it contemporaneously, and that he thereby consented to the procedure. Royster, on the other hand, cites two Florida cases for the proposition that failure to object cannot constitute waiver, and that even counsel's stipulation is insufficient. *See Brown v. State*, 538 So. 2d 833, 835 (Fla. 1989); *Carter v. State*, 512 So. 2d 284, 285 (Fla. Dist. Ct. App. 1987). In fact, some jurisdictions have determined that it may be per se reversible error for the trial judge to be absent from the bench during an integral part of a criminal trial. *See Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995) (judge's absence from bench coupled with failure to exercise discretion over whether certain testimony should be read back to jury grounds for reversal); *People v. Cook*, 659 N.Y.S.2d 510 (1997) (reversing criminal conviction without discussion after declaring trial judge's absence from courtroom without consent while testimony being read back to jury, is improper); *People v. Toliver*, 675 N.E.2d 463 (N.Y. 1996) (judge's absence from courtroom during prosecutor's jury voir dire per se reversible error); *People v. Ahmed*, 487 N.E.2d 894 (N.Y. 1995) (improper delegation of judicial

function to authorize law clerk to answer jurors' questions).

However, not all jurisdictions have adopted that "bright-line" rule. *See United States v. Grant*, 52 F.3d 448 (2d Cir. 1995) (noting that "distinction should be made between the judge's necessary presence while functional proceedings are in progress, and a presence serving only to satisfy symbolic ritual"; trial judge's absence during 2½ hour readback of testimony not reversible error); *Heflin v. United States*, 125 F.2d 700 (5th Cir.) (mere absence of judge for short time, absent showing of prejudice, not ground for reversal on direct appeal or collateral attack), *cert. denied*, 316 U.S. 687 (1942); *People v. Groves*, 677 N.E.2d 1351, 1362 (Ill. App. [sic]) (no "bright-line" rule that substitution of judge during any stage of trial constitutes reversible error; defendant failed to show prejudice), *appeal denied*, 684 N.E.2d 1339 (Ill. 1997); *People v. Lumpkin*, 570 N.Y.S.2d 620 (1991) (strongly disapproves practice of trial judge's absence during reading back of testimony, but refused to adopt per se rule).

Unfortunately, there is no precedential case authority from the Fourth Circuit Court of Appeals on this issue. However, a panel of that appellate court has made the following statements in an unpublished opinion on an appeal from this district:

> During the prosecutor's closing argument to the jury the trial judge left the courtroom, without objection from either party, and argument continued. [The judge returned to the courtroom when defense counsel objected to the prosecutor's comments].

* * *

> Appellate review of potential prejudice from the procedures surrounding the closing argument is virtually precluded because the closing arguments to the jury were not transcribed or reconstructed. In any event, [the defendant] does not point to any specific prejudice to him resulting from the procedure used. Moreover, the record supports the inference that the objectionable comments by the prosecutor were not prejudicial. Significantly, counsel did not request the court reporter to record the jury arguments, and did not request the trial judge to remain in the courtroom, even after the first objection to the prosecutor's comments.
>
> * * *
>
> Although we are concerned about the potential for prejudicial error when a trial judge leaves the courtroom at any stage of a trial, we believe that the judge's absence during closing argument in this case, if error, was harmless. . . . [The defendant] has waived any challenge to this issue by his repeated inattention to it.

Rawles v. Johnson, 1989 WL 42533, No. 88-7644 (4th Cir. April 24, 1989).[2]

Based on the Fourth Circuit Court of Appeals' disposition of *Rawles*, and on the analysis employed therein, this court concludes that the appellate court would not impose a per se rule that a trial judge's absence from the courtroom at any stage of a criminal trial is reversible

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[2] *Rawles* was a habeas case brought pursuant to 28 U.S.C. § 2254 challenging a state court sentence.

error. Rather, it appears more likely that this circuit would approve a rule requiring a defendant to demonstrate prejudice resulting from a trial judge's absence from the bench during a portion of a criminal trial before that absence would be grounds for post-conviction relief, especially when there was no contemporaneous objection to the court's announced intention to step out of the courtroom during closing arguments.

Here, Royster has failed to demonstrate prejudice. His suggestion that the undersigned's pre-announced absence from the courtroom during some portion of the Government's closing argument amounted to a "selective absence," demonstrating a "vouching" for the veracity and/or trustworthiness of the content thereof is sheer speculation. The factual premise upon which that argument springs itself is flawed – it appears from what little record exists of the proceeding that the judge *was* in the courtroom for the Government's "rebuttal."

Accordingly, the court concludes that (i) the factual premise upon which Royster bases this argument is flawed and/or unsupported by the record; (ii) even if Royster's factual premise was supported by the record, the Fourth Circuit Court of Appeals has not adopted a "bright-line" rule that the trial judge's absence from the bench is per se reversible error; (iii) Royster has not made a showing that he suffered prejudice as a result of the trial court's absence, for some period, from the bench during part of the Government's closing argument. Accordingly, there is no factual basis for his ineffective assistance of trial or appellate counsel claims, for which he must show that counsel's performance was deficient

and that such deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

For the foregoing reasons, the court concludes that Royster has failed to carry his burden in defending the Government's Motion for Summary Judgment as to these claims. That is, with regard to the judge's-absence-from-the-bench argument, Royster has failed to make a showing of competent evidence to support his claim, first, that the judge selectively was absent from the courtroom during closing arguments, and second, that such absence worked to his prejudice. Consequently, the court concludes that the Government is entitled to summary judgment in its favor as to each of Royster's claims arising from the trial judge's absence from the courtroom.

B. JURY INSTRUCTION/*GAUDIN* CLAIMS

Royster's next argument is that he is entitled to a new trial because the trial court, in violation of the Supreme Court's opinion in *United States v. Gaudin*, 515 U.S. 506 (1995), refused to allow the jury to determine all the elements of the crimes with which he was charged. The Court concluded in *Gaudin* that the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 509 (citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993)). Royster contends the court removed from the jury's consideration an element of the offenses charged in three counts of the Indictment. First, when instructing the jury on Count 2, charging Royster with

extortion in violation of 18 U.S.C. § 1951, the court stated in pertinent part:

> In order to establish the offense charged in Count Two and proscribed by [18 U.S.C. § 1951], the government must prove beyond a reasonable doubt each of the following elements:
>
> First: That the defendant was a public official, and I instruct you now that a police officer of the Oxford Police Department is a public official. In this regard, you are to take this element as established.

RT at 2044.

Second, Royster points out that the court instructed the jury as to Counts Four and Five, charging him with making false declarations to a federal grand jury in violation of 18 U.S.C. § 1623, in pertinent part as follows:

> Regarding the second element to be proved, the "materiality" of the matter in the alleged false testimony is not a matter with which you are concerned, but rather is a question for the court to decide. You are instructed that the questions asked the defendant, William Oscar Royster, also known as W.O., constituted material matters in the grand jury proceedings referred to in the indictment.

RT at 2050-51.

Gaudin was not announced until June 19, 1995, *after* Royster's direct appeal had been briefed and argued. Of course, there was no contemporaneous objection, but neither was the issue raised before the appellate court. *Gaudin* was not mentioned in the Fourth Circuit's unpublished opinion of July 31, 1995.

The Government argues that Royster's *Gaudin* claim must fail because of the "collateral sentence doctrine" and his failure to meet the applicable standard of prejudice. The defendant disagrees. However, the court does not perceive that the collateral sentence doctrine or the substantive law of *Gaudin* needs to be invoked here.

In order to obtain collateral relief based on errors not raised at trial or on appeal, Royster must demonstrate "cause" excusing his procedural defaults, and "actual prejudice" resulting from the error of which he complains. *See United States v. Frady*, 456 U.S. 125, 167-68 (1982). Of course, consistent with then-prevailing law, Royster's trial counsel quite properly did not object to the court's jury instructions regarding Royster's status as a "public official" in the Hobbs Act charge, or regarding the "materiality" of the allegedly false grand jury testimony in the § 1623 charge. Nevertheless, notwithstanding Royster's argument to the contrary, his *Gaudin* claims are procedurally barred.

Royster's case in this respect is identical to that of Harvey Bernard John, whose *Gaudin* claim – that the trial court improperly removed from the jury the question of the materiality of statements he made to a federal grand jury in violation of 18 U.S.C. § 1623 – the Fourth Circuit Court of Appeals found to be procedurally barred. *See United States v. John*, No 96-7305, 1997 WL 759272 (4th Cir. Dec. 10, 1997) (copy attached). After John's direct appeal had been briefed and argued, but still was pending before the Fourth Circuit Court of Appeals, the Supreme Court granted certiorari, heard argument and decided *Gaudin*. Similarly, Royster's direct appeal had been briefed and argued and remained pending in the Fourth Circuit when

the Supreme Court announced *Gaudin* on June 19, 1995. The opinions in both John's appeal and Royster's were handed down *after* that date – the opinion in Royster's direct appeal was announced on July 31, 1995 – about six weeks after *Gaudin*.

Like John, Royster had cause for his procedural default at trial. Also like John, however, Royster has not demonstrated cause for his procedural default on appeal.

> As the government notes, after *Gaudin* was decided, and while John's case was pending in this court, John could have brought *Gaudin* to this court's attention by offering it as supplemental authority. *See* Fed. R. App. P. 28(j). Under these circumstances, we find that there was no "external impediment" preventing John's counsel from raising the *Gaudin* claim on direct appeal. *See Murray* [*v. Carrier*, 477 U.S. 478] at 492 [(1986)] ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.")

John, slip op. at **2. Although Royster's § 2255 counsel acknowledges that *Gaudin* was announced "after Mr. Royster's direct appeal had been briefed and argued," Memo at 13, there is no attempt to make a cause and prejudice showing as required by well-established Supreme Court precedent, for the procedural default on direct appeal.

Although aware that *John* is not controlling precedent and that the Fourth Circuit Court of Appeals' Local Rule 36(c) "disfavors" citation of unpublished dispositions, this court finds the case strongly persuasive, because the

procedural posture and legal issue posed thereby were identical to those presented here. Accordingly, the court finds that Royster has not demonstrated that he had cause for his procedural default of the *Gaudin* claims on appeal. Having so found, the court need not address whether he suffered "actual prejudice." Because Royster's *Gaudin* claims are procedurally defaulted, the Government's motion to dismiss them is ALLOWED, and Royster's motion for § 2255 relief thereunder is DENIED.

C. CHARACTER EVIDENCE

Finally, Royster contends his trial counsel was ineffective because he failed to present the testimony of character witnesses who were available and ready to testify on his behalf at trial. In order to place this argument in context, some background is necessary. Royster's statement of that background comports with the court's recollection:

> At trial, Mr. Royster testified in his own defense and denied committing the acts charged in the indictment. After Mr. Royster's testimony, during a bench conference outside the presence of the jury, [defense counsel] admitted that he had numerous character witnesses who were willing to testify for the defense, and explained that:
>
> > [Mr. Currin:] I've got a lot of witnesses out here that we could put on that would be basically character witnesses, and we're considering not calling those character witnesses and going ahead and stipulating to that agreement.

* * *

This bench conference continued as follows:

> Mr. Evenson: The evidence we have available is that he [Royster] was spending money for sex with a number of women, and he's testified before the grand jury [about these women]. I've been very careful not to bring that out. . . . He [Royster has] brought that out himself.
>
> * * *
>
> Mr. Currin: I don't particularly want to see the women unless I'm going to put a bunch of character witnesses on, you know.

RT at 1924. Mr. Currin then determined that he would not call any character witnesses, and informed the Court and the prosecutor that: "I want to tell my character witnesses outside that I'm not going to need them, and that might give me an opportunity to get them out of the hotel for [sic] I don't have to pay for their room another night. RT at 1925.

Memo at 7-8.[3]

In short, Royster was not the only one with "character" evidence waiting in the wings. Had Royster called his "character" witnesses, the Government purportedly was fully prepared to unfurl some manner of evidence to

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[3] In his Memo, Royster leaves out the very next exchange, which is significant:

> Mr. Evenson: Is your client in agreement with that?
>
> Mr. Currin: We discussed it with him briefly, and I want to go and explain it to him.

the effect that Royster had purchased the sexual services of certain women, which evidence presumably would not be viewed in Royster's favor. However, up to that point in the trial, the Government had "been very careful not to bring that out." RT at 1924. The prosecutor advised defense counsel and the court that, should Royster undertake to introduce evidence of his good character, for instance, through the testimony of the "character" witnesses Royster now claims should have been called, then the Government was fully prepared to furnish some "character" evidence of its own.

In the present motion, Royster argues that his trial counsel was ineffective because he did not call the character witnesses due to his misunderstanding of the Rules of Evidence. That is, Royster suggests that his trial counsel wrongly believed that if he called Royster's character witnesses, the Government could and would call rebuttal witnesses – the women whose services Royster purportedly purchased – to testify about those specific instances. The court believes Royster underestimates his trial counsel's grasp of the situation.

Whether the Government had the women outside the courtroom and threatened to call them as witnesses is not absolutely clear, although the prosecutor did later say at the bench, "Well, I've given him my word if he's not going to put on character witnesses, I'm not going to call any women up here; that's for sure." RT at 1925. At that point in the trial, the court and counsel were discussing how many more witnesses were left in order to get an estimate on how much longer the trial would last.

Rule 404(a)(1), Fed. R. Evid. provides that evidence of a defendant's character, while not generally admissible, may be offered by the Government to rebut character evidence introduced by the defendant. Royster correctly notes that once the admissibility of character evidence is established under Rule 404(a)(1), Fed. R. Evid., the form of presentation must conform with Rule 405, which provides that the method of proof for rebuttal evidence may be by direct testimony of reputation, testimony in the form of an opinion, or by inquiry on cross-examination into specific instances of conduct to test a defense witness' knowledge of reputation. *See United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994). And as Royster further acknowledges, what the prosecutor would have done had he elected to call his character witnesses would have been to ask those witnesses on cross examination whether their opinions about Mr. Royster's character would change if, for instance, they knew that on such-and-such a date, Mr. Royster paid Ms. X $50 for sexual favors. Additionally, the prosecutor could have called the women in question to elicit their testimony with regard to their knowledge of his reputation or their opinion of his character. Regardless of the vehicle, the damning information explicitly would have been served up to the jury without calling the sex partners to testify to the specific instances of conduct, and Royster's suggestion to the contrary in the instant motion is disingenuous. The prosecutor promised not to go down that road unless Royster directly placed his "character" at issue by calling the character witnesses. The undersigned has a clear, independent recollection of the conversations at the bench and the specific context in which they occurred. Consequently, the court is confident

in the conclusion that counsel's decision not to "open the door" to that damaging evidence – however presented – plainly was a tactical one reached with Royster's concurrence, and obviously based on the defense team's perception that their "character" evidence would be far less memorable to the jury than the Government's rebuttal thereof.

Finally, the suggestion that the testimony of Royster's "character" witnesses might have swayed the jury to such an extent as to create a reasonable doubt, and, in any event, that failure to call those witnesses undermined confidence in the outcome of his trial, reveals a gross underestimation of the Government's case against Royster, and the rapport and credibility its star witness, drug kingpin Patrick Sidney, established with the jury. The Government's evidence against Royster was overwhelming. In short, Royster's claim for relief based on his trial counsel's failure to introduce testimony of character witnesses is utterly meritless, and his § 2255 motion thereon is DENIED.

SUMMARY

In summary, for the reasons stated herein, Royster's motion pursuant to 28 U.S.C. § 2255 is DENIED, the Government's Motion to Dismiss or for Summary Judgment is ALLOWED, and this action is DISMISSED.

SO ORDERED.

This the 26th day of January, 1998.

/s/ James C. Fox
James C. Fox
United States District Judge

APPENDIX 3

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-6758

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM OSCAR ROYSTER, a/k/a W. O.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CR-94-26-F, CA-97-287-5-F)

Submitted: September 30, 1998 Decided: October 15, 1998

Before ERVIN, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Sheryl Gordon McCloud, Seattle, Washington, for Appellant. Robert Edward Skiver, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

William Oscar Royster appeals the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West 1994 & Supp. 1998). We have reviewed the record and the district court's opinion and find no reversible error. McCloud did not demonstrate that the trial judge's absence from the bench during the Government's closing argument was prejudicial. *See United States v. Love*, 134 F.3d 595, 604-05 (4th Cir.), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3790 (U.S. June 15, 1998) (No. 97-9085). Accordingly, we affirm on the reasoning of the district court. *United States v. Royster*, Nos. CR-94-26-F; CA-97-287-5-F (E.D.N.C. Jan. 27, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX 4

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 28, 1998

No. 98-6758
CR-94-26-F
CA-97-287-5-F

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM OSCAR ROYSTER, a/k/a W. O.

Defendant-Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
MAY 3 1999

No. 98-1404

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM OSCAR ROYSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1488

QUESTION PRESENTED

Whether petitioner was entitled to collateral relief under 28 U.S.C. 2255 (1994 & Supp. III 1997) because the trial judge was absent from the bench during a portion of the prosecutor's closing argument at petitioner's trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1404

WILLIAM OSCAR ROYSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29a-30a) is unpublished, but the judgment is noted at 165 F.3d 22 (Table). An earlier opinion of the court of appeals (Pet. App. 1a-8a) is also unpublished, and the judgment is noted at 61 F.3d 901 (Table). The opinion of the district court (Pet. App. 9a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1998. A petition for rehearing was denied on December 28, 1998. The petition for a writ of certiorari was filed on March 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; extortion, in violation of 18 U.S.C. 1951; witness tampering, in violation of 18 U.S.C. 1512(b)(3); and making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. He was sentenced to 293 months' imprisonment. The court of appeals affirmed on direct appeal. Pet. App. 1a-8a. Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (1994 & Supp. III 1997). The district court denied the motion, Pet. App. 9a-28a, and the court of appeals affirmed, Pet. App. 29a-30a.

1. While petitioner was a police officer in Oxford, North Carolina, he accepted more than $100,000 in payoffs from the leader of a local cocaine distribution operation in exchange for police protection and confidential police information. Petitioner told a co-conspirator, Jimmy Chavis, that he should lie to a grand jury about the cocaine distribution organization. Petitioner also made false statements in his own grand jury testimony concerning his contacts with Chavis and other members of the organization. Pet. App. 2a, 6a.

A federal grand jury returned an indictment charging petitioner with conspiracy to possess and distribute cocaine, extortion, witness tampering, and perjury before the grand jury. Pet. App. 2a. At petitioner's trial, before the prosecutor began his closing argument, the district court stated to the jury:

> Finally, let me say to you that during the course of the arguments I may not stay here at the bench. I may go back into chambers and work on other

> matters, my charge or other matters that I have to attend to. But if I leave the bench, I'll be in ear shot of what's going on. If one of the lawyers should object to something that the other said, why, they know to stop their arguments until I can come back into the courtroom and rule on whatever the objections might be.
>
> As you know, the lawyers are officers of the court, and they follow the rules of the court in every respect.

Id. at 11a. The judge left the bench during a portion of the prosecutor's argument, but returned to the courtroom at the end of the argument, and, after a recess, was present for the defense counsel's closing argument and the prosecutor's rebuttal argument. *Id.* at 13a-15a. The jury found petitioner guilty of all the charges against him, *id.* at 2a, and the court of appeals affirmed his convictions, *id.* at 1a-8a.

2. Petitioner then filed a motion under 28 U.S.C. 2255 (1994 & Supp. III 1997), claiming, among other things, that the trial judge's "selective absence from the bench" during part of the prosecutor's closing indicated to the jury that the prosecutor, but not defense counsel, could be trusted in his absence, and therefore amounted to "vouching" for the integrity of the prosecutor. Pet. App. 14a-15a. Petitioner also contended that his trial counsel was ineffective in failing to object to the judge's absence from the bench, and that his appellate counsel was likewise ineffective in failing to argue on direct appeal that the judge's absence required reversal of his convictions. *Id.* at 10a-11a.

The district court denied petitioner's motion. Pet. App. 9a-28a. As an initial matter, the court rejected petitioner's assertion that the trial judge's "selective

absence" from the bench amounted to "vouching" for the prosecutor's integrity. The court found that claim to be "purely speculative" and "unsupported by any evidence of record," noting that the judge had been in the courtroom during the prosecutor's rebuttal argument. *Id.* at 11a- 15a, 18a. The court also declined to adopt a "per se rule that a trial judge's absence from the courtroom at any stage of a criminal trial is reversible error," finding it more likely that the court of appeals would require a defendant seeking post-conviction relief "to demonstrate prejudice resulting from a trial judge's absence from the bench, * * * especially when there was no contemporaneous objection to the court's announced intention to step out of the courtroom during closing arguments." *Id.* at 17a-18a. In this case, the district court concluded, petitioner had not shown that he was prejudiced by the judge's absence from the bench during a portion of the prosecutor's closing argument. *Id.* at 18a.

3. The court of appeals affirmed. Pet. App. 29a-30a. Citing its prior decision in *United States* v. *Love*, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998), the court held that petitioner "did not demonstrate that the trial judge's absence from the bench during the [g]overnment's closing argument was prejudicial." Pet. App. 30a.

ARGUMENT

Petitioner contends (Pet. 8-15) that the trial judge's absence from the courtroom during a portion of the prosecutor's closing argument constituted "structural error" that is not subject to harmless-error analysis, and further contends that the court of appeals' contrary decision conflicts with the decisions of other courts. Neither contention has merit.

1. This Court's cases establish a "strong presumption" that constitutional errors are subject to harmless-error inquiry. See *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Nonetheless, the Court has recognized a narrow class of fundamental constitutional errors—sometimes referred to as "structural errors"—that are intrinsically harmful and thus require reversal without inquiry into their effect on the trial's outcome. See *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). Unlike ordinary trial errors, structural errors generally affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Ibid.*; see also *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993) (constitutional errors are intrinsically harmful only where they "infect the entire trial process"). The Court has found such error "only in a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

The error at issue in this case—the trial judge's absence from the bench during a portion of the prosecutor's closing argument—bears no relation to the pervasive and fundamental errors that the Court has held to be intrinsically harmful. To the contrary, the judge's temporary absence did not affect the entire conduct of the trial, and is amenable to traditional methods of harmless-error review. This is not a case in which the trial judge abdicated his Article III

responsibility to rule on issues of law and otherwise ensure fundamental fairness. Instead, the judge simply announced that, rather than monitoring some portions of closing arguments from the bench, he would do so from nearby—remaining within "ear shot" and available to rule on any objections raised by counsel. Pet. App. 11a. Petitioner did not object to the judge's proposal that he monitor proceedings from a location other than the bench; and petitioner does not suggest that he was prejudiced by any statement made by the prosecutor while the judge was so doing. Indeed, no issues requiring the judge's decision were raised during the judge's absence. As a result, any error was plainly harmless.

2. Although petitioner argues that state and federal courts are in conflict on whether a trial judge's absence from the bench during a portion of trial is "reversible error *per se*" that can never be harmless, Pet. 10-12, no such conflict exists. In fact, petitioner cites no decision adopting the per se rule he proposes.

In the first case relied upon by petitioner, *Riley* v. *Deeds*, 56 F.3d 1117 (9th Cir. 1995), see Pet. 11, the trial judge had left the courthouse during the jury's deliberations, and the judge's law clerk granted the jury's request to have portions of the trial testimony read back by the court reporter. 56 F.3d at 1118-1122. Finding a "complete abdication of judicial control over the process," *id.* at 1121, the court of appeals invalidated the conviction. The court of appeals, however, specifically declined to decide "whether a judge's absence during the course of a trial, regardless of the nature of the proceeding from which he is absent and the duration of his absence, amounts to structural error which is reversible per se." *Id.* at 1120.

The court of appeals in *Riley*, moreover, specifically noted that, where there is an "express or implied waiver of the right to the judge's presence," or where "the judge, while technically absent, remained in 'effective control' of the proceedings," courts have refused to reverse convictions absent a showing of prejudice. 56 F.3d at 1121 (citing cases). Both of those conditions were present here. The judge here did not cede control over contested proceedings. Rather, he monitored the trial and exercised control from within "ear shot" rather than from the bench. See Pet. App. 11a (trial judge would "be in ear shot of what's going on" and would "rule on whatever * * * objections might be" raised). And, even though the judge announced his intention to monitor the trial and exercise control from nearby rather than from the bench, no party objected, and no legal issue requiring the judge's decision arose. Since petitioner did not resist the judge's proposal that he monitor proceedings from nearby, and the judge retained effective control over the proceedings in any event, *Riley* actually supports the court of appeals' decision to require a showing of prejudice in this case.

Petitioner's claim that the decision below also conflicts with *United States* v. *Mortimer*, 161 F.3d 240 (3d Cir. 1998), see Pet. 11, is similarly without basis. There, the court of appeals concluded that the district court's wholly unexplained "disappear[ance]" from the bench during the defense attorney's closing argument, with "no notice to counsel or the jury that he was about to depart," was structural error "[o]n the facts of this case." 161 F.3d at 241. There, unlike here, the trial court judge was not within earshot and was not able to maintain control over the proceedings. (Indeed, the prosecutor made an objection during the judge's

absence, "only to withdraw it with the exclamation '[t]he judge is not here.'" *Ibid.*) The court of appeals, moreover, expressly distinguished cases like this one, in which the parties expressly or impliedly consented to the judge's absence, explaining that the trial "structure normally stands if the parties consent to excuse the presence of a judge." *Ibid.*

Indeed, the court of appeals in *Mortimer* expressly distinguished *United States* v. *Love*, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998), the decision on which the court of appeals relied here. In *Love*, as in this case, the trial judge told the jury immediately before closing arguments that he would at times "be in his chambers, working on other matters," but that he would be available to rule on objections, and neither the government nor the defendant objected to the judge's absence from the bench. 134 F.3d at 604-605. Given that *Mortimer* expressly and reasonably distinguishes cases like this one and *Love*, the claim of conflict between this case and *Mortimer* is incorrect.

Petitioner's claim that the decision in this case conflicts with various state court decisions is likewise unsound. The cases on which petitioner relies (Pet. 12) all involved a trial judge's decision to relinquish control over the proceedings entirely, often without counsel's consent. See, *e.g.*, *People* v. *Ahmed*, 487 N.E.2d 894, 895-897 (N.Y. 1985) (judge absent from courtroom during jury deliberations; judge's law secretary answered jury's questions in his absence); *Brown* v. *State*, 538 So. 2d 833, 834-836 (Fla. 1989) (judge not present when communication from jury during deliberations was received and answered); *People* v. *Cook*, 659 N.Y.S.2d 510, 511 (N.Y. App. Div. 1997); *People* v. *Toliver*, 675 N.E.2d 463, 464 (N.Y. 1996); *People* v. *Vargas*, 673 N.E.2d 1037, 1044-1045 (Ill. 1996); *Glee* v. *State*, 639 So.

2d 1092, 1093 (Fla. Dist. Ct. App. 1994). None of those cases addresses a situation where, as here, the judge was within earshot and available to exercise judicial control over the proceedings at all times, the judge announced and explained where he would be without objection from counsel, and no issues for the judge's decision were raised in his absence in any event.[1]

3. Finally, there is no merit to petitioner's suggestion (Pet. 13-14) that the court of appeals' decision "conflicts in principle" with *Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, this Court held that trial before

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[1] For example, in *Vargas*, the Illinois Supreme Court distinguished an earlier decision in which it held that the trial judge's absence during closing argument was "harmless error because '[t]he judge was within hearing and no questions were raised to be passed upon by the judge.'" 673 N.E.2d at 1044 (quoting *Schintz* v. *People*, 52 N.E. 903, 905 (Ill. 1899)). The court reasoned that "[t]he harmless error approach of *Schintz* may be understood as a practical concession to the reality that a trial judge is not truly absent, and may in fact be constructively present, when he or she is off the bench but able to listen and participate in proceedings from a nearby anteroom." 673 N.E.2d at 1044. Similarly, *Slaughter* v. *United States*, 82 S.W. 732, 737-738 (Ct. App. Indian Terr. 1904), and *Graves* v. *People*, 75 P. 412, 413-415 (Colo. 1904), cited Pet. 12, rest in part on the fact that the judge was unavailable to rule on contested motions, and in any event pre-date *Chapman* v. *California*, 386 U.S. 18 (1967), the case in which this Court made it clear that even constitutional errors are subject to harmless-error review. See *id.* at 42 (Stewart, J., concurring) (until *Chapman*, Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'"). And *Turbeville* v. *State*, 56 Miss. 793 (1879), cited Pet. 12, does not support petitioner's claim of conflict at all. The court there, like the courts here, held that the trial judge's absence from bench during closing argument was not reversible error where the judge "remain[ed] within hearing of counsel" and "able * * * to assert his authority." 56 Miss. at 799.

a village official who has both a "direct personal pecuniary interest in convicting the defendant" (because he would be paid only in the event of a conviction) and a political interest as mayor in the financial condition of the village (which received a portion of any fine collected) violates due process. *Id.* at 523-534; see *Arizona* v. *Fulminante*, 499 U.S. at 309 (citing lack of judicial impartiality in *Tumey* as an example of a "structural defect[] in the constitution of the trial mechanism"). Petitioner does not suggest that the trial court had any pecuniary or personal interest in the outcome of his case. Instead he argues (Pet. 13) that "[t]he judge's actions indicated * * * that he trusted the government enough to refrain from doing anything wrong during his absence—but he did not trust the defense that much." Even setting aside the fact that jurors are highly unlikely to draw such an inference as a general matter,[2] the trial judge was present during the prosecutor's rebuttal argument, making that inference exceedingly unlikely in this case, as the district court held below. Pet. App. 15a. The trial judge, moreover, eliminated the possibility of such speculation concerning the "meaning" of his absence when he instructed the jurors as to where he would be and why, noted that he would still be able to rule on objections, and advised the jurors that both "lawyers are officers of the court, and" that both "follow the rules of the court in every respect." *Id.* at 11a. The district court therefore cor-

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[2] Indeed, prior defendants have generally argued the opposite —*i.e.*, not that the judge's absence implies that the closing is trustworthy, but rather that it implies that the closing is not worthy of attention. In *United States* v. *Mortimer*, for example, the defendant claimed that the judge's absence during defense counsel's closing may have caused the jury to "infer[] that the defense was not worth listening to." 161 F.3d at 242.

rectly concluded that petitioner's claim was "unsupported by any evidence of record" and "purely speculative." *Id.* at 14a, 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

NINA GOODMAN
Attorney

MAY 1999